Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	
Capability to All Americans in a Reasonable	)	CC Docket No. 98-146
and Timely Fashion, and Possible Steps	)	
to Accelerate Such Deployment	)	
Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

Comments of Metromedia Fiber Network Services, Inc. on the Deployment of Advanced Communications Infrastructure in the United States

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INTRODUCTION

Metromedia Fiber Network Services, Inc. ("MFN") submits these comments in response to the Commission's Third Notice of Inquiry into whether "advanced telecommunications capability" is being deployed to all Americans in a reasonable and timely fashion ("NOI"). This NOI is mandated by Section 706 of the Federal Telecommunications Act of 1996 ("Act")[1] and will result in a Commission report to Congress regarding the status of such deployment. If the Commission determines that advanced services are not being deployed in a reasonable and timely fashion, Section 706 obligates it to "take immediate action to accelerate deployment … by removing barriers to infrastructure investment and by promoting competition …"

As described in these comments, obtaining access to public rights of way poses a significant barrier to the deployment of broadband infrastructure. The Commission should identify this issue in its report to Congress and recommend enhancement of existing access laws to actively discourage governments from denying or unreasonably conditioning access to public rights of way. Additionally, the Commission should reopen its 1999 Notice of Inquiry into rights of way issues ("ROW NOI")[2] to provide definitive guidance regarding lawful rights of way management practices.

ACCESS TO PUBLIC RIGHTS OF WAY POSES A SIGNIFICANT BARRIER TO THE DEPLOYMENT OF BROADBAND INFRASTRUCTURE

At its most fundamental, broadband deployment is the construction of conduit networks and the installation of fiber optic cable in those conduits. Barriers to that

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[1] *See* § 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act), *reproduced in the notes under* 47 U.S.C. § 157.

[2] *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No.99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98,* FCC 99-141, CC Docket No. 96-98, released July 7, 1999.

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construction and fiber installation inhibit the deployment of broadband infrastructure. As one of the leaders of fiber optic cable deployment in the United States, MFN is well qualified to comment on what can accelerate such deployment – and what hinders it.

Unfortunately, while significant gains have been made, deployment of broadband capability is not where it could be – in large part because of hurdles to market entry erected by parochial governments anxious to place tolls on the information highway.

MFN has installed over 2 million fiber miles and has fiber operational in 29 cities worldwide. While this infrastructure is impressive, more construction is required to add infrastructure redundancy and to serve new customers. Unfortunately, it takes only one uncooperative jurisdiction along a fiber ring to render the entire ring, and thousands of fiber miles, unusable. Additionally, as these comments will demonstrate, it takes only one uncooperative jurisdiction to prevent MFN from serving a customer by connecting it to that ring, thus directly costing MFN thousands of dollars in lost revenues.

Previously, tight construction schedules and abundant capital enabled carriers to pay illegal demands for franchise and license fees to ensure completion of a ring and service to customers. With the tightening of available capital, carriers must now balance even more critical construction schedules, budgets, and revenue requirements with the long-term costs incurred by a decision to accede to illegal government demands. In many instances, faced with increasingly unreasonable demands for access to public rights of way, MFN has elected to litigate to enforce its well-established rights.

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However, even pervasive litigation has only limited effects. Despite conclusive legal "wins" by carriers in many parts of the country, governments in those same regions **continue** to "test" settled law regarding rights of way access – costing carriers hundreds of thousands, if not millions, of dollars in unnecessary attorney fees, increased construction costs, and lost revenues because of delayed deployment. While more "wins" may ultimately stem this litigation tide, MFN currently sees no end in sight. Each week brings the formation of a new municipal coalition dedicated to undermining existing rights of way access legislation. This translates into further delays and costs to deployment of MFN's own network – and the deployment of communications infrastructure nation-wide.

In most cases, governments have no incentives to comply with access laws. In contrast, a carrier faces extensive costs due to delays in obtaining access. Often, governments face only the legal costs to fight the battle - costs for which they bear little accountability, even if they lose. Unlike a private person who might be liable for interference with contractual advantage or other torts, governments are rarely responsible for damages to the delayed carrier or the legal costs incurred by the carrier to enforce its clearly stated rights. Recognition of this imbalance has led many carriers, including MFN, to sign blatantly illegal agreements, including clauses waiving all future rights to a challenge, in order to access the public rights of way. Such practices must end.

The Commission can directly affect this situation in at least two ways. First, it can comment on this situation and propose legislative remedies in its report to Congress. Among other things, legislative amendments should include:

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1. A specific time-frame of no more than 60 days in which a government must either grant or deny, with fully articulated and legally defensible reasons, an application for rights of way access (including construction and excavation permits);

2. Penalties and the opportunity to recover attorney fees and costs for a government's failure to comply with the Act;[3]

3. A prohibition on contractual waivers of rights to challenge a government's actions, applied to both past and future rights of way access agreements as against public policy; and

4. A finding that **all** local exchange carriers are "similarly situated" for purposes of Section 253 of the Act so that all carriers are ensured the same "non-discriminatory" treatment under the Act.

Second, the Commission can revive the ROW NOI and specifically enumerate those requirements that constitute legitimate rights of way management, and those that do not. Among other things, the Commission should find, like various courts before it, that the following requirements do not constitute legitimate rights of way management practices, and are therefore prohibited by the Act:

1. Fees that are not identified in writing and publicly available;

2. Fees in excess of the costs incurred to manage the public rights of way;

3. Prohibitions on the resale, leasing, or the granting of an indefeasible right to use the facilities to anyone who does not have a franchise;

4. Restrictions on the transferability of an access agreement and ownership of the facilities, including restrictions on the granting of security interests and stock sales;

5. Provisions requiring waiver of the right to challenge an access agreement;

6. Lengthy and detailed application forms that require disclosure of matters such as: corporate policies and business plans; detailed ownership and control information; financial, technical and legal qualifications; a description of all current or future services; and open-ended requirements to produce additional information "as needed";

[3] *See* Michigan law at MSA 22.1469(601) for an example of legislation containing appropriate penalties.

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7. Overreaching reporting and inspection requirements;

8. In kind compensation requirements, such as free fiber and conduit capacity; and

9. Buy-back provisions that provide that title to the facilities and related equipment will transfer to the municipality at no cost upon termination or expiration of an access agreement.

To demonstrate the need for the actions MFN urges the Commission to take, MFN offers three recent examples of instances where MFN has been required to litigate settled legal principles regarding rights of way access in order to enforce its rights.[4] None of these cases have involved a challenge to legitimate rights of way management practices (notwithstanding possible city claims to the contrary). MFN has no issue with legitimate rights of way management regulations. It recognizes that such regulations benefit all parties by ensuring coordination and protecting the integrity of installed systems. In each case described below, the real dispute involves a city attempt to challenge legal constraints on its ability to raise revenues from carriers occupying the public rights of way. While each of these cases has already resulted, or ultimately will result, in legal "victories" to MFN, these victories are somewhat hollow, given the delays resulting in lost revenues, unnecessary construction costs, and in some cases, indefinitely deferred market entry.

1. DEARBORN, MICHIGAN – RECENT DECISION FROM MICHIGAN PSC

MFN's case against the City of Dearborn, MI ("Dearborn") evidences most dramatically the nature of the problems faced by carriers seeking access to public rights

[4] These are not the only jurisdictions that have created barriers to MFN's access of public rights of way. On many occasions, MFN has elected to either "route around" the jurisdiction or concede to illegal demands due to business demands or the fear of political retribution for instituting litigation.

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of way.[5] Notwithstanding explicit state law requiring Dearborn to approve or deny a permit request within 90 days,[6] the city refused to respond to MFN's permit requests. Instead, it insisted on a franchise containing terms, including revenue-generating franchise fees, clearly illegal under state law.[7] After attempting to enforce its rights through nearly a year of negotiations with Dearborn, MFN was forced to file a complaint with the Michigan Public Service Commission ("Michigan PSC"), which has authority to enforce the Michigan Telecommunications Act ("MTA").[8]

The Michigan PSC found that MFN was entitled to its attorney fees and costs under state law "because the City's position in this proceeding has been frivolous as defined in that section."[9] The Michigan PSC further commented:

> The Commission finds that the City's primary purpose in asserting its claimed defenses has been to harass and injure MFN. Furthermore, as discussed in this order, some of the City's legal positions are devoid of arguable legal merit.[10]

Given Dearborn's history of litigation over the MTA with other providers, the Michigan PSC found that the city had not dealt with MFN in good faith – "Any reasonable reading of the MTA and the court decisions should have resulted in the City's issuance of a lawful permit long ago."[11] In response to the City's constant litigation of settled

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[5] *See Opinion and Order, Metromedia Fiber Network Services, Inc. v. City of Dearborn, MI*, Case No. U-12797, Michigan Pub. Serv. Comm'n, Aug. 16, 2001 ("Opinion and Order").

[6] *See* MSA 22.1469(251)(3): "A local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit for access to a rights-of-way, easement, or public place."

[7] *See* MSA 22.1469(253): "Any fees or assessments made under section 251 shall be on a nondiscriminatory basis and **shall not exceed the fixed and variable costs to the local unit of government in granting the permit and maintaining the right-of-way, easements, or public places used by a provider**." (Emphasis added).

[8] MSA 22.1469(101) *et seq.*

[9] *Opinion and Order, mimeo* at p. 30.

[10] *Id.* at pp. 30-31.

[11] *Id.* at pp. 28-29.

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principles – and in an effort to discourage further delays - the Michigan PSC exercised its authority under the MTA to impose monetary penalties on Dearborn. In words bittersweet to MFN, the Michigan PSC acknowledged the irreparable harm to both MFN and consumers wrought by Dearborn's refusal to comply with the law:

> It cannot seriously be contended that the City's conduct has not caused economic loss. The City played at least a significant role, if not the sole role, in MFN's decision to cease construction of its network in the Detroit area. MFN's entry into the marketplace has been indefinitely delayed, and the company has invested in constructing a network that it cannot complete and use. In addition, the City has harmed the residents of Michigan and its own residents by depriving them of access to another high-speed broadband network.[12]

In these prescient remarks, the Michigan PSC drives at the heart of this Commission's inquiry – what are the barriers to broadband deployment and how can they be removed? Clearly, time-consuming litigation against intransigent cities is a barrier to broadband deployment. Commission action, of the type outlined in these comments, is a necessary step towards removing those barriers.

2. CARROLLTON, TEXAS – RECENT DECISION FROM TEXAS PSC

MFN has 89 miles of fiber optic backbone in the Dallas, TX metropolitan area. Among other things, MFN provides inter-office transport to other carriers and private line services to end-use customers. Approximately July 17, 2001, MFN sought excavation permits from the city of Carrollton, TX ("Carrollton") for less than two miles of construction. MFN needed to build a service lateral to connect a customer located in Carrollton to its fiber optic backbone, located in an adjacent city.

In MFN's experience, obtaining excavation permits in Texas had previously been relatively straightforward – in large part due to state legislation passed in 1999 to clarify the law regarding rights of way access. Chapter 283 of the Texas Local Government

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Code (or "HB 1777") eliminated franchising requirements in lieu of a compensation scheme implemented by the Public Utility Commission of Texas ("Texas PUC")[13] for providers certificated by the agency. Municipalities, uncertain regarding their rights under the new law, could contact Texas PUC staff for guidance, and they generally complied with HB 1777's mandates.

This has all changed. Texas municipalities, unhappy with the compensation scheme implemented by the Texas PUC, are now intent on reversing HB 1777 to raise additional revenues. Notwithstanding the fact that HB 1777 prohibits franchises and rights of way fees,[14] Carrollton insisted that MFN sign an agreement and pay fees substantially higher than those required by HB 1777 as a condition of accessing the rights of way to serve its customer. To avoid the clear mandate of HB 1777, Carrollton illogically argued that MFN was not a certificated telecommunications provider ("CTP") and was therefore not eligible for the benefits of HB 1777 – this despite the fact that MFN is certificated by the Texas PUC. Carrollton refused to discuss the issue with Texas PUC staff.

Recognizing the significant implications of this new trend among Texas municipalities, MFN elected to stand on its rights. Notwithstanding the time constraints it was under to serve its customer, it filed a complaint against Carrollton with the Texas PUC. On September 19, 2001, the Texas PUC came to the obvious conclusion that any telecommunications provider certificated to offer local exchange service, even if only providing nonswitched telecommunications service, is a CTP for purposes of HB

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[12] *Id.* at p. 29 (citations to transcript omitted).
[13] *See* HB 1777 Secs. 283.051 and 283.052
[14] *Id.*

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1777.[15] Thus, while MFN will ultimately prevail in this litigation – MFN has incurred irreparable damages as a result of refusing to accede to Carrollton's demands. Among other things, MFN was unable to provide service to its customer within the time frame anticipated, resulting in additional construction costs, lost revenue, and damage to MFN's service reputation.

3. BERKELEY, CALIFORNIA – PENDING FEDERAL COURT LITIGATION

The city of Berkeley, California ("Berkeley") has lead California cities in advancing novel and unsupported interpretations of law in an attempt to generate revenues. As a result, MFN and at least one other carrier have sued Berkeley to strike down its ordinances and force it to grant fair and non-discriminatory access to its public rights of way. Fortunately, the Ninth Circuit's recent decision, *City of Auburn v. Qwest Corp*., 247 F.3d 966, 980 (9th Cir. 2001) ("*Auburn*"), provided the California Northern District Court the clear authority to enjoin Berkeley's first rights of way ordinance.[16] However, this has not deterred Berkeley from enacting a new ordinance, incorporating many of the same faults of the enjoined one. In summary, Berkeley's new ordinance purports to regulate any carrier providing private carriage, and seeks, among other things, to impose an illegal agreement, rights of way fees, and service regulation upon the carrier as a condition of rights of way access.[17] Thus, heedless of its impact on

[15] The Texas PSC reached this decision during its September 19, 2001 public meeting. It will be memorialized in a written order issued no later than September 28, 2001.
[16] *See Qwest Communications Corp. v. City of Berkeley*, Order Granting Preliminary Injunction, No. C 01-0663 SI (N.D. Cal., May 23, 2001) ("*Berkeley*").
[17] *See* Berkeley Municipal Code Sec. 16.11.070(A)(ii). Only carriers meeting the following requirements, as determined by the City, are exempt from franchise requirements and rights of way fees:

> Any telephone corporation holding a Certificate of Public Convenience and Necessity (CPCN) issued by the California Public Utilities Commission (CPUC) but only to the extent that … [it] is providing said service on a common carrier

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national telecommunications policy and the deployment of broadband infrastructure in the San Francisco Bay Area, and despite clear defeat under both *Auburn* and *Berkeley*, Berkeley continues to test the limits of the law – in the name of local revenues.

CONCLUSION

As demonstrated herein, municipalities have routinely placed their parochial desires to raise revenue above state and federal laws and policies expressly adopted to encourage broadband deployment. There is no doubt that these actions have unnecessarily delayed broadband deployment, in some instances, indefinitely. There is a need for legislation creating disincentives to this behavior, and there is a need for Commission action. MFN respectfully requests the Commission to include MFN's recommendations in its report to Congress and to reopen the ROW NOI and quickly bring it to a meaningful conclusion.

Respectfully submitted on September 24, 2001:

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basis, and has fulfilled all of the requirements of the Telecommunications Act (TCA) for the provision of a telecommunication service including, without limitation, the making of all required payments for the advancement of universal service as required by Section 254 of the TCA and the implementing regulations of the Federal Communications Commission and the filing of all necessary tariffs or compliance with all detariffing and related notice requirements. …

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Comments of Metromedia Fiber Network Services, Inc. on the Deployment of Advanced Communications Infrastructure in the United States" were filed electronically at the FCC on this 24th day of September, 2001 and on the 24th day of September, 2001 were sent to the of the following via U.S. mail:

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